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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MONTANA  
 MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W.R. GRACE & COMPANY and  
 KOOTENAI DEVELOPMENT  
 CORPORATION,

Defendants.

Civ. No. CV-00-167-M-DWM

**DEFENDANTS' PREDISCOVERY  
 DISCLOSURE STATEMENT**

Defendants W.R. Grace & Co., a Delaware corporation ("Grace"), and Kootenai Development Corporation ("KDC") submit this Prediscovery Disclosure Statement in accordance with the provisions of Rule 200-5 of the Rules of Procedure of the United States District Court for the District of Montana.

**I. Background.**

This lawsuit arises from the United States Environmental Protection Agency's ("EPA's") attempt to use the "access" provisions of § 104(e) of CERCLA to seize KDC's property for the disposal of wastes generated from EPA's vermiculite-related response activities on a third party's property.

1 In the 1880s gold miners discovered a significant body of vermiculite ore in an  
2 area located in the mountains about 7 miles northeast of the town of Libby, Montana.  
3 One of the "tramp" minerals found in the vermiculite deposits near Libby was tremolite,  
4 which has come to be thought of as a form of asbestos.

5 The Zonolite Company (originally known as Universal Zonolite Insulation  
6 Company) was formed in 1939 to mine and process vermiculite from the Libby ore  
7 deposit into insulating materials and other products. W.R. Grace & Co. - Conn. ("Grace-  
8 Conn"), a Connecticut corporation which is not a party to this lawsuit, purchased  
9 Zonolite Company in about 1963 and continued commercial mining and processing  
10 operations in and near Libby until about 1990.

11 In the mid-1990s, Grace-Conn sold all of the properties associated with its former  
12 vermiculite operations in and near Libby. KDC purchased approximately 3,600 acres of  
13 mountainous land that includes the former vermiculite mine (the "Mine Site") in 1994.  
14 KDC also currently owns two other properties in Libby. One of these is an  
15 approximately 20-acre parcel known as the "Kootenai Flyway" located between Highway  
16 37 and the Kootenai River, just south of a former vermiculite processing facility known  
17 as the "Screening Plant." The other KDC property is an approximately 42-acre parcel,  
18 known as the "Bluffs," situated on the bank of the Kootenai River opposite from the  
19 Screening Plant.

20 For many years EPA has been aware of concerns related to potential asbestos  
21 exposure associated with the former vermiculite mining and processing operations in the  
22 Libby area. In response to more recent media and public attention, EPA commenced a  
23 series of investigations in and near Libby in November of 1999. In the spring of 2000,  
24 EPA determined that a removal action was necessary to address the alleged release of  
25 asbestos at the Screening Plant and another former vermiculite processing facility in  
26 Libby known as the "Export Plant." EPA and its contractors are currently conducting  
27 response activities at the Screening Plant. Grace-Conn is conducting response actions at

1 the Export Plant pursuant to an administrative order issued by EPA. To date, EPA has  
2 made no determination that any cleanup actions are necessary at the Mine Site.

3 The Screening Plant is currently owned by Mel and Lerah Parker who, beginning  
4 in about 1994, used the property for commercial agricultural operations. As part of its  
5 Screening Plant activities, EPA has demolished several buildings, including a residential  
6 house and other structures, torn up several acres of asphalt pavement and concrete  
7 tunnels, and excavated approximately 13 acres of soil. EPA's soil excavation has gone  
8 below nine feet deep in places -- far below the depth at which soils could possibly have  
9 been impacted by vermiculite operations at the Screening Plant. Demolition debris and  
10 excavated soils, as well as metal storage tanks, piping, metal hoppers, and agricultural  
11 chemicals have been stored at the Screening Plant site by EPA for offsite disposal. Upon  
12 information and belief, EPA has paid the current owners of the Screening Plant over  
13 \$1,000,000 for access to their property and for property damages caused by EPA's  
14 Screening Plant removal action.

15 On various occasions commencing in the late fall of 1999 and continuing through  
16 the spring and early summer of 2000, Paul Peronard of EPA approached KDC's  
17 president, Mark Owens, to request access to the Mine Site and other properties owned by  
18 KDC and Mark Owens. Mr. Owens verbally consented to many of EPA's requests, but  
19 each consent to access was limited to sampling and investigation at specific dates and  
20 times. EPA never requested of Mr. Owens that KDC grant access to its property for  
21 cleanup activities and KDC never granted EPA permission to perform such activities. At  
22 no time did KDC consent to EPA's disposal of wastes on KDC's property.

23 In the spring of 2000 Mr. Peronard first mentioned to Mr. Owens EPA's interest in  
24 using the Mine Site for the permanent disposal of remediation waste. Although no  
25 written proposals were exchanged, EPA orally offered to provide KDC with protection  
26 from CERCLA liability in exchange for (1) the surrender of an unspecified portion of the  
27 Mine Site as a permanent disposal site for remediation wastes and (2) KDC's forfeiture to

1 EPA of 25% of the net proceeds of any future sale of KDC's properties. KDC and EPA  
2 never consummated an agreement for waste disposal on KDC's property.

3 On July 14, 2000, Grace-Conn purchased two-thirds of the outstanding shares of  
4 the stock of KDC. The new management of KDC was concerned about the potential  
5 liability posed by EPA's poorly defined and unsupervised access to the KDC properties  
6 (the rugged Mine Site in particular) as well as the vagueness and lack of specificity of the  
7 prior oral access arrangements. By letter dated July 18, 2000, David Cleary, in-house  
8 counsel for Grace acting as agent for KDC, informed EPA of some of these concerns and  
9 advised EPA to contact him regarding future access. The letter was intended to assure  
10 that future access agreements with EPA addressed KDC's concerns and memorialized in  
11 writing any agreements reached between the parties. For this reason, the letter makes  
12 clear that any oral consent to access that EPA might view as outstanding was terminated.  
13 The July 18 letter also mistakenly stated that Grace had acquired KDC's property in  
14 connection with the stock purchase. In fact, Grace did not acquire any KDC property.  
15 KDC promptly corrected this unintentional misstatement by letter from counsel dated  
16 July 20, 2000.

17 On June 19 EPA faxed a letter back to Mr. Cleary attaching what EPA described  
18 as a "non-negotiable" access agreement ("July 19 Agreement") that EPA demanded  
19 Grace sign and return within 24 hours. The July 19 Agreement is fundamentally flawed  
20 and could not be signed without amendment. Not only does it misidentify the property  
21 owner -- admittedly due, in all likelihood, to the misstatement in the July 18 letter -- it is  
22 also unduly vague, overbroad and overreaching. In particular, it requires KDC to  
23 surrender "all. . . properties owned by Kootenai Development Corporation . . ." to EPA  
24 for the disposal of Screening Plant wastes. KDC responded the very next day to correct  
25 the misunderstanding regarding the property ownership and to invite EPA to negotiate a  
26 reasonable access agreement that (1) adequately described the particular KDC properties  
27 to which EPA sought access; (2) adequately described the specific activities EPA

1 intended to conduct on KDC's property; (3) addressed appropriate and just compensation  
2 for EPA's use and related potential damage to the property; and (4) provided KDC with  
3 appropriate protection from liability arising from EPA's disposal activities on KDC's  
4 property.

5 In early August the parties commenced global settlement talks which subsumed  
6 access negotiations. To facilitate these discussions, KDC granted EPA access for  
7 oversight and investigation purposes during the negotiations, which the parties agreed  
8 should conclude by August 28, 2000. Although a global settlement was not reached,  
9 KDC subsequently granted EPA access for investigation and oversight purposes in  
10 agreements dated August 28, 2000 and September 1, 2000. By letter dated September  
11 12, 2000, KDC again offered to meet with EPA to work out a reasonable agreement for  
12 the disposal of EPA wastes on KDC's property. On September 14, 2000 the government  
13 responded by filing suit against KDC and W. R. Grace & Co.

## 14 **II. Factual Bases for Defense.**

15 1. Defendants have not denied EPA's request for access to the KDC  
16 properties. In fact, KDC has expressly granted EPA access to its properties to perform  
17 oversight, sampling and other investigations necessary to determine the need, if any, for  
18 response actions at the KDC properties. Despite repeated requests, EPA has not  
19 provided Defendants with any plans or other written documents describing what, if any,  
20 particular cleanup actions EPA has determined are necessary for any of the KDC  
21 properties.

22 2. By letter dated July 19, 2000, EPA demanded that Grace sign an "access  
23 agreement" attached thereto ("July 19 Access Agreement") and stated that the July 19  
24 Access Agreement was "non-negotiable." The July 19 Access Agreement which EPA  
25 seeks to enforce in this lawsuit contains numerous factual inaccuracies, ambiguities and  
26 confusing provisions including the following:  
27

- 1       ●     It identifies David Cleary as "the owner" of the property; but David Cleary  
2             owns no property in or near Libby, Montana.
- 3       ●     It describes the affected property as including "all . . . properties owned by  
4             Kootenai Development Corporation, which are now owned by W.R.  
5             Grace & Co." W.R. Grace & Co. does not own any real property formerly  
6             owned by KDC and has never owned any of the real property at interest in  
7             this case.

8           3.     The July 19 Access Agreement demands that Defendants permit EPA to  
9     "[d]ispos[e] of wastes from EPA's response action(s) at the Screening Plant" on "all . . .  
10    properties owned by Kootenai Development Corporation . . . ." EPA's demand to  
11    dispose of wastes permanently on KDC's property will result in the permanent  
12    occupation of such property by these EPA wastes.

13          4.     EPA refuses to pay KDC any compensation for EPA's proposed seizure of  
14    KDC's property for the permanent disposal of EPA's wastes. EPA also refuses to pay for  
15    any property damages that may result from its proposed waste disposal operations on  
16    KDC's property. Upon information and belief, EPA has paid other PRPs over  
17    \$1,000,000 in connection with access and damages caused by EPA's response actions on  
18    such PRP's property.

19          5.     EPA refuses to take any responsibility for liability resulting from EPA's  
20    proposed disposal of Screening Plant wastes on KDC's property. Nevertheless, EPA's  
21    contractor, MARCOR, expressed concerns about using the Mine Site for disposal of  
22    EPA's Screening Plant waste and has obtained a complete indemnity from EPA for all  
23    liability for all such disposal activities at the Mine Site.

24          6.     The July 19 Access Agreement places no limits on the scope, nature, or  
25    timing of the activities on KDC's property for which EPA seeks access. The July 19  
26    Access Agreement does not specify which of the three KDC properties upon which EPA  
27    intends to dump its Screening Plant waste. It does not specify any particular location on

1 any of the KDC properties at which EPA intends to dispose of the Screening Plant  
2 remediation wastes. It does not describe the nature or quantity of wastes EPA intends to  
3 dump on KDC's property. It does not describe the times or dates during which EPA's  
4 proposed activities would take place or when they are scheduled to end.

5         7         The Mine Site is not located adjacent to the Screening Plant.

6         8.         W.R. Grace & Co. does not own and has never owned the KDC properties  
7 to which EPA seeks access in this case.

8 **III.   Legal Theories of Defense.**

9         A.         The action is improperly brought against Defendants because KDC has  
10 granted EPA access to the KDC property to which EPA is entitled pursuant to § 104(e).  
11 As admitted in the government's Complaint and Memorandum in Support of Motion for  
12 an Order in Aid of Immediate Access, KDC has granted EPA access to the KDC property  
13 for the purposes of sampling, investigation and determining the need, if any, for response  
14 action. Accordingly, there is no basis for the government's suit to enjoin interference  
15 with entry because no such interference has occurred. 42 U.S.C. § 9604(e)(5)(B)(i).  
16 KDC's request for reasonable terms to accommodate the government's disposal of EPA's  
17 Screening Plant wastes does not obstruct EPA's entry in violation of the statute. See  
18 United States v. Omega Chem. Corp., 156 F.3d 994 (9th Cir. 1998) (refusal to sign  
19 agreement granting EPA unconditional access does not violate section 104(e)).

20         B.         EPA's demand for entry is arbitrary, capricious, an abuse of discretion and  
21 otherwise not in accordance with law. 42 U.S.C. § 9604(5)(B)(i).

22                 1.         EPA's request for entry beyond that which KDC has already granted  
23 exceeds EPA's authority under section 104(e) of CERCLA. Under section 104(e)(1)  
24 EPA's entry authority is limited to properties at which it is taking response actions and  
25 properties "adjacent to" such properties. 42 U.S.C. § 9604(e)(1). EPA seeks access to  
26 KDC's property in order to "effectuate a response action" that EPA has taken at the  
27 Screening Plant property owned by Mel and Lerah Parker. The Parker property is

1 located over 7 miles from the Mine Site. Since the Mine Site is not "adjacent to" the  
2 Screening Plant, section 104(e) provides no authority for EPA to commandeer the Mine  
3 Site in order to "effectuate" EPA's response action at the Screening Plant. Id.

4           2. EPA's demand for access is impermissibly vague and overreaching.  
5 As discussed above, EPA's demand inaccurately describes the subject property and its  
6 ownership and generally fails to describe, in specific terms, the particular properties and  
7 portions of such properties to which EPA seeks access. EPA's demand also fails to  
8 adequately describe the particular activities EPA plans to conduct on such property.  
9 EPA's demand for access is impermissibly vague and overbroad because it is not  
10 sufficiently specific to ensure that such access is limited to only those portions of KDC's  
11 property necessary to achieve EPA's statutory purposes. See United States v. Tarkowski,  
12 No. 99C7308, 2000 U.S. LEXIS 7393 (N.D. Ill., May 25, 2000).

13           3. CERCLA § 104(e) does not authorize EPA to take KDC's property.  
14 The statute only authorizes EPA to enter at reasonable times. 42 U.S.C. § 9604(e)(3).  
15 EPA's occupation of KDC's property -- forever -- with a waste dump does not constitute  
16 entry at reasonable times. It is an unlawful confiscation of property and is not authorized  
17 by § 104(c).

18           4. EPA is only authorized to take property under CERCLA §1041(j)  
19 when such property is needed to conduct remedial action and after just compensation has  
20 been paid. See 42 U.S.C. § 9604(j).

21           C. Section 104(e) only permits entry to "effectuate a response action" when  
22 such entry is "needed" to do so. 42 U.S.C. § 9604(e)(3)(D). EPA has not demonstrated a  
23 need to enter and permanently occupy KDC's property with Screening Plant remediation  
24 waste. In fact, EPA has admitted that although it "prefers" to dump its waste at the Mine  
25 Site, it does not need KDC's property for disposal because there are alternative disposal  
26 locations available.



1 D. The action is improperly brought against W.R. Grace & Co. because it does  
2 not own the KDC properties. Section 104(e)(5)(B) of CERCLA authorizes the  
3 government to bring suit to compel compliance with an EPA request for entry to real  
4 property. 42 U.S.C. § 9604(e)(5)(B). W.R. Grace & Co. does not hold title or any other  
5 legal right or interest in the property at issue in this case and is, therefore, not a proper  
6 defendant to such an action by the government.

7 E. To the extent KDC's request to negotiate reasonable terms for a disposal  
8 agreement is deemed a denial of access, KDC's denial was reasonable for the reasons  
9 stated above. In addition, by voluntarily donating its property for the disposal of removal  
10 action wastes as demanded by EPA, KDC may prejudice its right to make a Tucker Act  
11 claim against the United States. For these reasons, Defendants' actions are reasonable  
12 and not subject to civil penalties pursuant to 42 U.S.C. § 9604(e)(5).

13 **IV. Individuals with Discoverable Information.**

14 A Alan Stringer, 317 Mineral Avenue, Libby, Montana 59923, telephone:  
15 406-293-3964. Mr. Stringer is the project manager for Grace-Conn's investigation and  
16 removal activities in and near Libby, Montana. Mr. Stringer has general knowledge of  
17 the facts underlying this case and personally participated in many of the discussions  
18 between the various parties regarding proposed removal and reclamation activities as  
19 well as access issues.

20 B. James Stout, URS, 633 17<sup>th</sup> Street, Suite 2500, Denver, Colorado 80202-36253,  
21 Denver, Colorado, telephone: (303) 675-2500. Mr. Stout is the project manager for  
22 URS, Grace-Conn's contractor for investigation and removal activities in and near Libby,  
23 Montana. Mr. Stout has general knowledge of the facts underlying the case and  
24 personally participated in some of the discussions between the various parties regarding  
25 proposed removal and reclamation activities as well as access issues.

26 C. Ray Lidstrom, URS, 633 17<sup>th</sup> Street, Suite 2500, Denver, Colorado 80202-  
27 36253, Denver, Colorado, telephone: (303) 675-2500. Mr. Lidstrom is a manager for

1 URS, Grace-Conn's contractor for investigation and removal activities in and near Libby,  
2 Montana. Mr. Lidstrom has general knowledge of the facts underlying the case and  
3 personally participated in some of the discussions between the various parties regarding  
4 proposed removal and reclamation activities as well as access issues.

5 D. Other Employees of URS. Other employees of URS have general  
6 knowledge as to the facts underlying the case and investigation and removal activities in  
7 and near Libby, Montana.

8 E. David Cleary, W.R. Grace & Co., 5400 Broken Sound Blvd., Boca Raton,  
9 Florida 33487; telephone: (561) 362-2825. Mr. Cleary is Senior Environmental Counsel  
10 for Grace. Mr. Cleary has knowledge of discussions and correspondence between EPA  
11 and KDC regarding access as well as personally participating in global settlement  
12 negotiations with EPA.

13 F. Mark Owens, P.O. Box 1055, Libby, Montana 59860, telephone: (406)  
14 293-6848. Mr. Owens is the former president of KDC and has general knowledge  
15 concerning facts underlying the case. Mr. Owens participated in discussions with EPA  
16 concerning access to the KDC properties.

17 G. Dale Cockrell, Two Medicine Building, 160 Heritage Way, Kalispell,  
18 Montana 59901, telephone: (406) 751-6000. Mr. Cockrell is an attorney in the law firm  
19 of Christensen, Moore, Cockrell, Cummings & Axelberg, P.C., and participated on  
20 behalf of KDC in discussions with EPA regarding access to the KDC properties.

21 H. Matthew Cohn, USEPA Region VIII, Legal Enforcement Program, 999  
22 18<sup>th</sup> Street, Suite 500, Denver, Colorado, telephone: (303) 312-6853. Mr. Cohn is EPA's  
23 attorney with respect to this matter and has general knowledge of the facts underlying the  
24 case and participated in discussions with various parties regarding access.

25 I. Kelcey Yarbrough Land, USEPA Region VIII, Technical Enforcement  
26 Program, 999 18<sup>th</sup> Street, Suite 500, Denver, Colorado, telephone: (303) 312-6393. Ms.  
27 Land is an enforcement specialist at EPA Region VIII in Denver, Colorado and has

1 general knowledge concerning the facts underlying this case. Ms. Land also participated  
2 in negotiations between the various parties and drafted certain correspondence relevant  
3 to the case.

4 J. Paul Peronard, USEPA Region VIII, Technical Enforcement Program, 999  
5 18<sup>th</sup> Street, Suite 500, Denver, Colorado, telephone: (303) 312- 6808. Mr. Peronard is  
6 the On Scene Coordinator for EPA Region VIII with respect to investigation and  
7 removal activities in and near Libby, Montana. Mr. Peronard has general knowledge of  
8 facts underlying the case and participated in discussions among the various parties  
9 regarding access to the KDC properties.

10 K. Patrick Plantenberg, Lee Metcalf Bldg., 1520 E. Sixth Ave., Helena,  
11 Montana 59620-0901, telephone: (406) 444-4960. Mr. Plantenberg is a reclamation  
12 specialist with the Montana Department of Environmental Quality and has general  
13 knowledge of facts underlying the case.

14 L. John Constan, 2209 Phoenix Ave., Helena, Montana 59620, telephone:  
15 (406) 444-1438. Montana. Mr. Constan works for the Montana Department of  
16 Environmental Quality and has general knowledge of facts underlying the case.

17 M. Dan Figueroa, MARCOR Remediation, Inc., telephone: (406) 293-1306.  
18 Mr. Figueroa works for EPA's removal action contractor, MARCOR Remediation, Inc.  
19 and has general knowledge of facts underlying the case including EPA's planned removal  
20 action at the Screening Plant and the indemnification given MARCOR by EPA.

21 N. Other employees of MARCOR Remediation, Inc. Other employees of  
22 MARCOR have general knowledge as to facts underlying the case.

23 O. Mel Parker, 5000 Hwy. 37 North, Libby, Montana. Mr. Parker is an owner  
24 of the Screening Plant Property that has been subject to EPA's removal actions. Mr.  
25 Parker has knowledge of payments EPA has made to him and his wife for access and  
26 property damage resulting from EPA's response activities on his property.

1 P. Lerah Parker, 5000 Hwy. 37 North, Libby, Montana. Mrs. Parker is an  
2 owner of the Screening Plant Property that has been subject to EPA's removal actions.  
3 Mrs. Parker has knowledge of payments EPA has made to her and her husband for access  
4 and property damage resulting from EPA's response activities on her property.

5 **V. Documents.**

6 The documents listed below may be relevant and reasonably likely to bear on the  
7 claims or defenses asserted in this case. Most are already in the possession of the  
8 Plaintiff; all others can be made available for inspection and copying by contacting the  
9 undersigned.

10 A. May 23, 2000 Action Memorandum from Paul Peronard to Max H. Dodson  
11 regarding a request for a time critical removal action at the "Libby Asbestos Site-Export  
12 Plant and Screening Plant, Former Processing Areas, Libby, Lincoln County, Montana."

13 B. Letter dated July 18, 2000 from David M. Cleary to Matthew Cohn, Esq.  
14 and Paul Peronard.

15 C. Letter dated 7/19/00 from Kelcey Yarbrough Land to David M. Cleary and  
16 attached "Consent for Access to Property".

17 D. July 20, 2000 letter from Kenneth W. Lund to Matthew Cohn, Esq. and  
18 Kelcey Land.

19 E. Letter dated August 3, 2000 from James D. Freeman to Kenneth W. Lund  
20 and three draft "Consent for Access to Property" agreements attached thereto.

21 F. Letter dated August 8, 2000 from Kenneth W. Lund to Matthew Cohn and  
22 attached, executed "Consent for Access to Property" agreement.

23 G. Letter dated August 14, 2000 from Kenneth W. Lund to Matthew Cohn,  
24 Esq. and two attached "Consent for Access to Property" agreements.

25 H. Letter dated August 28, 2000 from Kenneth W. Lund to Paul Peronard and  
26 Matthew Cohn, Esq. and attached "Consent for Access to Property" agreement.  
27

1 I. Letter dated September 1, 2000 from Katherine Jarvis Cogan to Matthew  
2 Cohn and attached, executed "Consent for Access to Property."

3 J. All other correspondence between the parties regarding access.

4 K. MARCOR Remediation, Inc. Health and Safety Plan version 1.1,  
5 Screening Plant Operable Unit 02 Libby, MT dated 7/15/00, and all other documents  
6 created by MARCOR that relate to the work it is performing for EPA with respect to  
7 Libby, Montana.

8 B. URS, Draft Work Plan, Removal of Asbestos Impacted Soils and  
9 Vermiculite at the Kootenai Development Company – Kootenai River Properties #1 and  
10 #2, 27 September 2000.

11 C. URS, Approved Work Plan, Removal of Asbestos and Vermiculite at the  
12 Libby Asbestos Site, 28 July 2000.

13 D. Agreement dated December 1, 1994 by and between Kootenai  
14 Development Company and W.R. Grace & Co. - Conn.

15 E. Purchase and Sale Agreement dated December 1, 1994 by and between  
16 Kootenai Development Company and W.R. Grace & Co. - Conn.

17 F. Stock Purchase Agreement among W.R. Grace & Co. - Conn., Kootenai  
18 Development Company, Mark G. Owens, and Jack W. Wolter dated 14 July 2000.

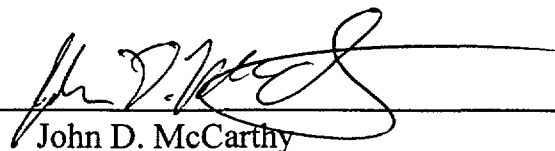
19 **VI. Insurance Agreements Applicable.**

20 No insurance policies are applicable to this action.

21 DATED this 7<sup>th</sup> day of November, 2000.

22 Holme Roberts & Owen LLP  
23 1700 Lincoln Street, Suite 4100  
24 Denver, CO 80203  
25 Attorneys for Defendants

26 By

  
John D. McCarthy

**CERTIFICATE OF MAILING**

I, the undersigned, an employee of the law firm of Holme Roberts & Owen LLP, hereby certify that on this 7<sup>th</sup> day of November, 2000, a true copy of the **PREDISCOVERY DISCLOSURE STATEMENT (W.R. GRACE)** was served upon counsel as described below:

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